



STATE OF WISCONSIN Division of Hearings and Appeals

In the Matter of

Office of the Inspector General, Petitioner

vs.

DECISION

Case #: FOF - 161046

██████████ Respondent

Pursuant to a petition filed September 26, 2013, under Wis. Admin. Code §HA 3.03, and 7 C.F.R. § 273.16, to review a decision by the Office of the Inspector General to disqualify ██████████ from receiving FoodShare benefits (FS) for a period of one year, a hearing was held on November 14, 2014, at Milwaukee, Wisconsin.

The issue for determination is whether the respondent committed an Intentional Program Violation (IPV).

There appeared at that time the following persons:

PARTIES IN INTEREST:

Petitioner:

Representative: Megan Ryan, PARIS Agent

Office of the Inspector General
Department of Health Services - OIG
PO Box 309
Madison, WI 53701

Respondent:

Representative:

██████████
████████████████████
████████████████████

████████████████████
████████████████████
████████████████████

ADMINISTRATIVE LAW JUDGE:

Mayumi Ishii
Division of Hearings and Appeals

FINDINGS OF FACT

1. ██████ and ██████ are the Respondent's children, though paternity of ██████ has not, yet been adjudicated. (Exhibit 16)
2. On September 7, 2010, the circuit court ordered joint custody of ██████ with substantially equal placement of the child. The court further ordered that the child be placed with the father, "upon reasonable times and reasonable notice". The child's name was also changed from ██████ to ██████, taking the Respondent's last name, though she is sometimes listed as ██████ (Exhibit 15)

3. On July 12, 2013, the Respondent completed an on-line ACCESS application for FoodShare benefits. In that application the Respondent included [REDACTED] and [REDACTED] as part of his household. The Respondent electronically signed the application, indicating that he understood the penalties for giving false information / breaking program rules and indicating that the information in the application was correct and complete to the best of his knowledge. (Exhibit 3)
4. On September 4, 2013, the Respondent provided a letter from the mother, [REDACTED], indicating that [REDACTED] and [REDACTED] did not reside with her in South Carolina and that they lived with the Respondent in Wisconsin. (Exhibit 8)
5. On October 24, 2013, [REDACTED] signed a Child Guardian Consent Form, in an attempt to assign guardianship of [REDACTED] to [REDACTED], who is [REDACTED]'s mother. (Exhibit 10)
6. On October 25, 2013, [REDACTED] took the children to South Carolina "for the holiday season". (Exhibit 16)
7. [REDACTED] refused to return the children to Wisconsin. (Exhibit 16)
8. On December 4, 2013, the Respondent completed an on-line ACCESS Six Month Report Form (SMRF), again reporting [REDACTED] and [REDACTED] as part of his household. The Respondent electronically signed the SMRF, indicating the information was correct and complete to the best of his knowledge. (Exhibit 4)
9. On January 9, 2014, the Department of Health Services sent the Respondent a Notice of Proof Needed, requesting verification of the children's living arrangement, [REDACTED]'s school enrollment and of his household composition. The verification was due January 20, 2014. (Exhibit 5)
10. The Respondent did not provide the requested proof, so the children were removed from his case sometime between January 20, 2014 and February 4, 2014. (Exhibit 7)
11. In February 2014, the Respondent attempted to retrieve the children from South Carolina, but was refused access to the children by [REDACTED] (Exhibit 16)
12. Since April 2014, the Respondent has been refused phone contact with the children. (Exhibit 16)
13. On September 4, 2014, the Respondent, through his attorney, filed a motion to enforce the physical placement order. (Exhibit 16)
14. On October 15, 2014, the Office of Inspector General (OIG) prepared an Administrative Disqualification Hearing Notice, alleging that the Respondent provided false information in order to receive benefits to which he was not entitled between October 1, 2013 and March 31, 2014. (Exhibit 1)

DISCUSSION

What is an Intentional Program Violation?

7 C.F.R. §273.16(c) states that Intentional Program Violations "shall consist of having intentionally: 1) Made a false or misleading statement or misrepresented facts; or 2) Committed an act that constitutes a violation of the Food Stamp Act, the Food Stamp Program Regulations, or any State statute for the purpose of using, presenting, transferring, acquiring, receiving, possessing or trafficking of coupons, authorization card or any other reusable documents used as part of an automated delivery system (access device)."

The Department's written policy restates federal law, below:

3.14.1 IPV Disqualification

7 CFR 273.16

A person commits an Intentional Program Violation (IPV) when s/he intentionally:

1. makes a false or misleading statement, or misrepresents, conceals or withholds facts; or
2. commits any act that constitutes a violation of the Food Stamp Act, the Food Stamp Program Regulations, or any Wisconsin statute for the purpose of using, presenting, transferring, acquiring, receiving, possessing or trafficking of FoodShare benefits or QUEST cards.

An IPV may be determined by the following means:

1. Federal, state, or local court order,
2. Administrative Disqualification Hearing (ADH) decision,
3. Pre-charge or pretrial diversion agreement initiated by a local district attorney and signed by the FoodShare recipient in accordance with federal requirements, or
4. Waiver of the right to an ADH signed by the FoodShare recipient in accordance with federal requirements.

FoodShare Wisconsin Handbook, §3.14.1¹

The agency may disqualify only the individual who either has been found to have committed the IPV or has signed a waiver or consent agreement, and not the entire household. If disqualified, an individual will be ineligible to participate in the FS program for one year for the first violation, two years for the second violation, and permanently for the third violation. However, any remaining household members must agree to make restitution within 30 days of the date of mailing a written demand letter, or their monthly allotment will be reduced. 7 C.F.R. §273.16(b).

What is OIG's burden of Proof?

In order for the agency to establish that a FoodShare recipient has committed an IPV, it has the burden to prove two separate elements by clear and convincing evidence. The recipient must have: 1) committed; and 2) intended to commit an intentional program violation per 7 C.F.R. §273.16(e)(6).

"Clear and convincing evidence" is an intermediate standard of proof which is more than the "preponderance of the evidence"(a.k.a. "more likely than not") used in most civil cases and less than the "beyond a reasonable doubt" standard used in criminal cases.

In Kuehn v. Kuehn, 11 Wis.2d 15, 26 (1959), the court held that:

Defined in terms of quantity of proof, reasonable certitude or reasonable certainty in ordinary civil cases may be attained by or be based on a mere or fair preponderance of the evidence. Such certainty need not necessarily exclude the probability that the contrary conclusion may be true. In fraud cases it has been stated the preponderance of the evidence should be clear and satisfactory to indicate or sustain a greater degree of certitude. Such degree of certitude has also been defined as being produced by clear, satisfactory, and convincing evidence. Such evidence, however, need not eliminate a reasonable doubt that the alternative or opposite conclusion may be true. In criminal cases, while not normally stated in terms of preponderance, the necessary certitude is universally stated as being beyond a reasonable doubt.

Wisconsin Jury Instruction – Civil 205 is also instructive. It provides:

Clear, satisfactory and convincing evidence is evidence which when weighed against that opposed to it clearly has more convincing power. It is evidence which satisfies and convinces you that "yes" should be the answer because of its greater weight and clear convincing power. "Reasonable certainty" means that you are persuaded based upon a rational consideration of the evidence. Absolute certainty is not required, but a guess is not enough to meet the burden of proof. This burden of proof is known as the "middle burden." The evidence required to meet this burden of proof must be more

¹ The FoodShare Wisconsin Handbook may be found on-line at <http://www.emhandbooks.wisconsin.gov/fsh/fsh.htm>

convincing than merely the greater weight of the credible evidence but may be less than beyond a reasonable doubt.

Further, the *McCormick* treatise states that “it has been persuasively suggested that [the clear and convincing evidence standard of proof] could be more simply and intelligibly translated to the jury if they were instructed that they must be persuaded that the truth of the contention is highly probable.” 2 *McCormick on Evidence* § 340 (John W. Strong gen. ed., 4th ed. 1992).

Thus, in order to find that an IPV was committed, the trier of fact must derive from the evidence, a firm conviction as to the existence of each of the two elements even though there may exist a reasonable doubt that the elements have been shown.

The Merits of OIG’s Case

In the case at hand, the Office of the Inspector General (OIG) asserts that the Respondent violated the rules of the FoodShare Program between October 1, 2013 and March 31, 2014, by claiming that his children were in his household when, in fact, they were living in South Carolina.

It is undisputed that the children have been in South Carolina since the end of October 2013. It is also undisputed that the Respondent did not report the children’s absence to the FoodShare agency.

7 CFR §273.12(a)(5) allows states to implement simplified reporting requirements. Wisconsin implemented such a program. *FoodShare Wisconsin Handbook* §6.1.1 Food Units need only report changes in income exceeding 130% of the Federal Poverty Level, by the tenth of the month following the month in which the change occurred.² *Id.* at §6.1.1.2 Other changes, such as changes in household composition, need only be reported in the Six Month Report Form or at Renewal/Review. *FoodShare Wisconsin Handbook* §§1.2, 2.1, 2.2 and 6.1.2

Individuals who are temporarily absent may still be included in the household. *FoodShare Wisconsin Handbook* §3.2.1.2 A temporary absence is defined, in part, as an absence that is expected to be less than two full consecutive calendar months past the month of departure. *Id.* In addition, an absent child must have resided with the food unit immediately before the absence, the child must be expected to return to the home and the individual in the food unit claiming the child must responsible for the child’s care and control when the child returns. *FoodShare Wisconsin Handbook* §3.2.1.2

The best information in the record is that the children left in October 2013; that they resided with the Respondent before they left; and that he would be responsible for their care and control when they return to his home, pursuant to the court order in Exhibit 15.

Two, full calendar months after the month of departure, would be the months of December 2013 and January 2014.

At the time the Respondent completed his Six Month Report Form in December 2013, the Respondent might very well have expected his children to return to him. Indeed, the children’s absence would not have ceased being considered temporary until February 1, 2014. As such, there is insufficient evidence to establish that the Respondent was lying when he completed the December 2013 Six Month Report Form and reported the children in his home.

Once the children were no longer considered temporarily absent on February 1, 2014, the Respondent had until his renewal to report the change in residence. *FoodShare Wisconsin Handbook* §§1.2, 2.1, 2.2, 6.1.1.2, and 6.1.2. However, the FoodShare benefits that the Respondent received for his children did not last that long, because their benefits ended sometime around February 1, 2014, due to a failure to provide verification.

² However, for food units that are comprised entirely of elderly, blind, or disabled individuals with no earned income, changes must be reported within ten days that the change becomes known to the food unit. *FoodShare Wisconsin Handbook* §6.1.1.1 There is no evidence that this is the case, here.

With regard to the notice of proof needed issued in January 2014, it is undisputed that the Respondent didn't provide any proof that the children were living with him. He didn't have any such proof, because the children were in South Carolina. Failing to provide proof does not constitute an intentional program violation, when, as in this case, that proof does not exist. The proscribed remedy when the required proof is not provided is case closure. *See FoodShare Wisconsin Handbook §1.2* In this case, the FoodShare agency removed the children from the Respondent's case when he didn't provide the requested proof by January 20, 2014. Because the Respondent didn't receive benefits for his children m after that time, no IPV occurred.

Accordingly, it is found that OIG has not met its burden to prove that the Respondent's non-reporting of his children's absence constituted a violation of the rules of the FoodShare program between October 2013 and March 2014.

CONCLUSIONS OF LAW

OIG has not met its burden to prove, by clear and convincing evidence, that the Respondent intentionally violated the rules of The FoodShare Program between October 2013 and March 2014.

NOW, THEREFORE, it is ORDERED

That IPV case number [REDACTED] is hereby reversed.

REQUEST FOR A REHEARING ON GROUNDS OF GOOD CAUSE FOR FAILURE TO APPEAR

In instances where the good cause for failure to appear is based upon a showing of non-receipt of the hearing notice, the respondent has 30 days after the date of the written notice of the hearing decision to claim good cause for failure to appear. See 7 C.F.R. sec. 273.16(e)(4). Such a claim should be made in writing to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875.

APPEAL TO COURT

You may also appeal this decision to Circuit Court in the county where you live. Appeals must be filed with the Court **and** served either personally or by certified mail on the Secretary of the Department of Health Services, 1 West Wilson Street, Room 651, Madison, WI 53703, **and** on those identified in this decision as "PARTIES IN INTEREST" **no more than 30 days after the date of this decision** or 30 days after a denial of a timely rehearing request (if you request one).

The process for Circuit Court Appeals may be found at Wis. Stat. §§ 227.52 and 227.53. A copy of the statutes may be found online or at your local library or courthouse.

Given under my hand at the City of Milwaukee, Wisconsin,
this 12th day of January, 2015.

\sMayumi Ishii
Administrative Law Judge
Division of Hearings and Appeals

c: Office of the Inspector General - email
Public Assistance Collection Unit - email
Division of Health Care Access and Accountability - email
[REDACTED] - email

Megan Ryan - email



State of Wisconsin\DIVISION OF HEARINGS AND APPEALS

Brian Hayes, Administrator
Suite 201
5005 University Avenue
Madison, WI 53705-5400

Telephone: (608) 266-3096
FAX: (608) 264-9885
email: DHAMail@wisconsin.gov
Internet: <http://dha.state.wi.us>

The preceding decision was sent to the following parties on January 12, 2015.

Office of the Inspector General
Public Assistance Collection Unit
Division of Health Care Access and Accountability



megan.ryan@wisconsin.gov